

Secondary failure during a multimodal transport under the Rotterdam Rules

- How is secondary failure to be allocated during a multimodal transport including an international sea carriage?



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1 INTRODUCTION

1.1 The aims of the thesis

The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the “Rotterdam Rules”) is the latest convention, even though not yet in force, governing carriage by sea. ”The project is ambitious in that it is not confined to the familiar territory of the sea carrier’s liability for cargo.”¹ It also covers multimodal carriage involving sea carriage, which raises difficult issues of how the new Convention will interact with existing carriage conventions such as United Nations Convention on the Contract for the International Carriage of Goods by Road (“CMR”).² The convention will come into force one year after the twentieth ratification by a UN member state. Currently only two UN member states have ratified the Rotterdam Rules even though 24 states has signed the convention.³

However, it is not a far-fetched thought that the Convention would come into force in the coming years thus possibly considerably extending the period of responsibility for the sea carrier from today’s port-to-port approach to the Rotterdam Rules’ door-to-door approach.

Despite the Rotterdam Rules’ much broader approach than its predecessors’ the main focus of the Rotterdam Rules is to regulate the carrier’s liability for lost or damaged cargo or goods as it may be named. Even though with a broader approach the new convention builds directly on the previous conventions for carriage of goods by sea: the Hague Rules, the Hague-Visby Rules and the Hamburg Rules.⁴

This thesis will focus on examining some of the implications of this possibly extended period of responsibility and potential conflicts with other conventions governing, or aiming to govern, other legs of the carriage. More precisely the thesis will examine the possible liability of the sea carrier in relation to secondary failure and evolving, un-localised damage occurring during one or more legs of carriage during a multimodal transport for which the sea carrier might become responsible even though the goods is not in the sea carrier’s custody under the Rotterdam Rules. The main goal of the thesis is to present and high light possible conflicts along the way in the text.

¹ Baughen, Simon, *Shipping Law*, (Routledge) 2012, 5th ed., p. 138.

² Baughen, Simon, *Shipping Law*, (Routledge) 2012, 5th ed., p. 138.

³http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html, accessed 01.05.2013.

⁴ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010.p. 77.

The basis for the thesis will be the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (“Rotterdam Rules”). To highlight possible conflicts the Convention for the Unification of Certain Rules for International Carriage by Air (“Montreal Convention”), Convention for the Unification of Certain Rules relating to International Carriage by Air 1929 (“Warsaw Convention”), the United Nations Convention on the Contract for the International Carriage of Goods by Road (“CMR”), Convention concerning International Carriage by Rail (“COTIF-CIM”) and the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (“CMNI”) as well as the not yet entered into force United Nations Convention on International Multimodal Transport of Goods 1980 (“the Multimodal Transport Convention”) will be used to assist in drawing the line between the Rotterdam Rules and other international carriage conventions.

1.2 The structure and limits of the thesis

This thesis will start with trying to define the concept of secondary failure and thereafter move on to aiming at a description and examination of the relevant articles of the Rotterdam Rules, which governs international multimodal carriage involving a sea carriage.

In all chapters the relevant concepts will be defined along the way.

The concept of secondary failure, evolving un-localised damage, will be defined as well as the conditions for the Rotterdam Rules aiming to apply.

The thesis will start with a presentation of the concept of secondary failure and thereafter will the relevant articles of the Rotterdam Rules governing multimodal international carriage and the relationship between the Rotterdam Rules and other international conventions follow. Along the way, the thesis will continue to examine the possible conflicts. The door-to-door approach in the Rotterdam Rules will be presented and considered in an aim to identify the conventions the Rotterdam Rules will be interacting with and where potential clashes might occur.

This thesis will be focusing on international multimodal carriage to which the Rotterdam Rules might become applicable once the Rotterdam Rules has come into force. As the Rotterdam Rules has not yet come into force no specific nations will be referred to in this thesis but the aim will be to highlight the interaction of the Rotterdam Rules with other carriage conventions covering other modes of transport. The focus will be to present the relevant articles of the Rotterdam Rules which governs international multimodal transport and

how secondary failure might be treated, or not, under these rules. To illustrate the potential clashes with other international carriage conventions, the so-called unimodal conventions, will be used as examples, the focus is however not to compare the conventions further.

2 SECONDARY FAILURE

2.1 Introduction

The above briefly described widened door-to-door approach of the Rotterdam Rules with the Rotterdam Rules as a fall back position when the damage is un-localised and / or evolving requires the concept to be further investigated.

A certain portion of all the cargo transported in the international trade will inevitably be damaged or loss during the transport. The legal systems is then to allocate who should bear the financial responsibility for such losses and by doing so the way the involved parties perform or acts will be influenced by the consequences.⁵

First of all, the relevant event that must occur during the carrier's period of responsibility is normally the loss of or damage to the goods. If the cargo owner can show that the goods were in good condition when the shipper consigned the goods to the carrier and that the goods either never were delivered or were delivered in a damaged condition then the cargo owner has discharged his burden of proof and established a prima facie case against the carrier.⁶ That is why the length of the period of responsibility is so important.

However, if the actual damage or loss takes place outside the period of responsibility but the event or circumstance that caused the loss occurred within the period that might impose difficulties. That might for example be a delay and that may very well be hard to establish when it occurred even though the event that caused it may be identifiable. Then a cargo owner claiming for his losses due to the delay can establish his prima facie case by showing that the relevant event or circumstance occurred while the goods was with the carrier. That is, during the carrier's period of responsibility. If the cargo owner or other claimant shows that the loss occurred during the carrier's period of responsibility then the cargo owner does not need to show the actual timing of the loss, damage or delay.⁷

⁵ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p. 3.

⁶ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p. 97.

⁷ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p. 97.

Further, losses or damages may have more than one cause, so called multiple causes, and this may arise in several situations. Sometimes the damage might have been caused by one event and another discrete part of the damage may have been caused by another event. In other cases, the first event would by itself only have caused a certain degree of damage while another event exacerbates the damage. As a third example, two events in combination may have caused damage, which without one of them never would have occurred.⁸

With more and more complicated facts the analysis gets even more complicated and hard to actually unveil what the real cause of the damage and when and where the damage actually occurred. The possibility of multiple causes of a damage is accounted for by Article 17 (1) of the Rotterdam rules which allows the cargo owner or other claimant to only show that at least one cause took place during the carrier's period of responsibility to shift the burden of proof to the carrier. That leaves the carrier as liable for the damage unless he can prove the opposite. Thus, Article 17 (1) is very important as to who is to pay for a damage that you cannot localise or which is unexplained.⁹

2.2 The concept of secondary failure

The concept of un-localised damage is as set out above used in the meaning that the damage "...occurs during more than one leg or where it cannot be proved where the loss or damage occurred..."¹⁰

Un-localised damage might be both when the location where the damage occurred cannot be identified or if the damage occurs gradually over several different modes of transport. An example of the latter is for example that the damage is caused throughout the whole carriage developing gradually during the different legs of the carriage. The un-localised damage might

⁸ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p. 97.

⁹ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p. 98.

¹⁰ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p.p. 43-44.

also be referred to as non-localised damage and the latter evolving damage as progressive damage.¹¹

Here, both un-localised damage and secondary failure will be used to describe the possible problems that might arise in connection to the other unimodal carriage conventions.

An attempt to further pin point the concept of secondary failure, evolving un-localised damage, and its relationship with the Rotterdam Rules will be made in the following chapters.

¹¹ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p. 66.

3 THE ROTTERDAM RULES

3.1 Introduction to the Rotterdam Rules

This chapter will briefly present the background of the Rotterdam Rules in short as well as the idea behind altering from the well-known concept of the port-to-port approach to the new door-to-door approach.

The regime governing the carriage of goods by sea has been increasingly questioned for among other things, being out of date and uncoordinated with other transport regimes. The United Nations Convention on the Carriage of Goods by Sea (“Hamburg Rules”) was introduced with the aim of improving the situation but fell short of expectations, as they have not been universally accepted as the regime governing international sea carriage. Further, the modern sea transport has more and more developed from the widely known port-to-port sea carriage into a door-to-door multimodal commercial transport involving a sea carriage.¹²

The basis for adopting the new wider door-to-door approach was that a large and increasing number of practical situations were operated under door-to-door contracts, especially the increasing use of containers to transport goods.¹³

Containerised transportation has become the norm in world transport and it is becoming increasingly common for the carrier to assume responsibility for a longer part of the transport, often from the place of shipment, and all the way through to the place of destination. These places are more and more often from an inland manufacture to a port where the container is loaded and further to the port of discharge and into a destination inland.¹⁴

It is thus held that this longer transport period needs to be addressed in a different manner than the previous tackle-to-tackle principle and into a more modern door-to-door approach. It is further argued that to separate this longer transport into several periods, some of which are covered under a liability regime and some of which are not covered would be artificial. To cover the sea leg but exclude the other parts of a much longer transport would create gaps between the unimodal liability regimes now in place. To make the carriage subject to one

¹² Ziegler, Alexander, Schelin, Johan, Zunarelli, Stefano, *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 2010, p. xxi.

¹³ Ziegler, Alexander, Schelin, Johan, Zunarelli, Stefano, *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 2010, p. xxv.

¹⁴ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p.59.

liability regime covering the whole transport without any tackle-to-tackle or port-to-port principles is argued to be both more logical from a legal point of view and more efficient from a practical point of view.¹⁵

Already from the beginning of the work on a new carriage convention it was considered preferable to make a new carriage convention cover the entire transport from the start to the beginning without any geographical restriction. The idea was that if the seller and the buyer agrees to a contract under which the goods are to be transported from the seller to the buyer through different stages of transport already the draft of the Rotterdam Rules extended the period of responsibility to a door-to-door approach.¹⁶

This new door-to-door approach may seem very revolutionary but many contracts of sea carriage are extended to apply the Hague regimes into inland transport as a matter of contract.¹⁷

With the increasing use of containers in international trade and as losses in the container trade often is concealed due to the containers arriving for shipment in a sealed condition and normally so remain throughout the carriage the door-to-door approach will potentially extend the liability for the shipper when the damage is un-localised. Further, if the damage develops gradually during the carriage and during more than one mode of transport this also potentially falls within the extended liability regime of the Rotterdam Rules.¹⁸

Several load words were identified when starting the process to develop a new regime after the failure to win acceptance of the Hamburg Rules. When drafting the Rotterdam Rules the promotion of legal certainty, harmonisation and modernisation of the rules governing international contracts of carriage, development of trade and enhanced efficiency were lead words.¹⁹

¹⁵ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. 59.

¹⁶ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p. 60.

¹⁷ Nikaki, Theodora, Soyer, Baris, *A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive AND Efficient or Just Another One for the Shelves?* Berkeley Journal of International Law, ISSN 1085-5718, 2012, Volym 30, Nummer 2, p. 308.

¹⁸ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 40.

¹⁹ Nikaki, Theodora, Soyer, Baris, *A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive AND Efficient or Just Another One for the Shelves?* Berkeley Journal of International Law, ISSN 1085-5718, 2012, Volym 30, Nummer 2, p. 307.

This wider door-to-door application of the liability regime under the Rotterdam Rules could create conflicts with other liability regimes for the carriage of goods claiming applicability to the same events.²⁰

The concept of un-localised damage is used in the meaning that the damage “...occurs during more than one leg or where it cannot be proved where the loss or damage occurred...”²¹

3.2 Scope of application

A multimodal transport is not referring to one mode of transport inevitably it refers to multiple modes of transport. Not even if one carrier performs all the legs of the transport would the legs be considered as one combined leg, it would be several different legs representing several unimodal carriages. Each unimodal leg would still be a unimodal carriage with an existing unimodal convention governing it.²² However, a sea leg is always required to make the Rotterdam Rules applicable, the convention is thus not a fully multimodal convention but more of a maritime plus convention.²³

Article 5 Section 1 of the Rotterdam Rules defines the scope of application to:

“...contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places are located in a Contracting State:

- (a) The place of receipt;*
- (b) The port of loading;*
- (c) The place of delivery; or*
- (d) The port of discharge.”*

²⁰ Fujita, Tomotaka, *The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implications*, Texas international law journal, 2009, volume 44, issue 3, p. 356.

²¹ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p.p. 43-44.

²² Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 91.

²³ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 92.

The convention has clearly a contractual approach but also puts up three geographical requirements, which must be satisfied to allow the Rotterdam Rules to apply.²⁴

It is clear according to Article 5 that an international element must be present in the carriage to invoke the Rotterdam Rules but do the sea leg itself need to be international if the place of delivery or of receipt are in another State but the sea leg is performed between two ports in the same State? Yes, it should be as the requirement set out as quoted above, is for the port of loading of a sea carriage and the port of discharge of a sea carriage must be in different States as set out above. Thus, the Rotterdam Rules requires that the sea carriage itself is international to apply.²⁵

The Rotterdam Rules are thus not a multimodal carriage convention applying to multimodal transports only by other modes of transport without a sea leg. The idea was that the Rotterdam Rules is a convention for sea carriage and only in special circumstances should the Rotterdam Rules operate in a broader manner.²⁶

Although the door-to-door approach of the Rotterdam Rules is one of the early and continuous ideas behind the convention it is not inevitable that the door-to-door approach applies under the Rotterdam Rules. The determination of the length of the carrier's period of responsibility is dependent on the terms of the contract in question.²⁷

The convention allows the parties entering into a traditional tackle-to-tackle contract if they so desire. That is allowed as the parties, under Article 12 (3), may agree on the time and place of receipt of the goods as well as on the time and place of delivery of the goods. The restriction lies in that the parties may not agree to receive the goods before the initial loading actually takes place nor can they agree that the time of delivery is prior to the time when the goods finally are unloaded at the end. The parties may thus not agree on a period of responsibility that is shorter than the tackle-to-tackle period but Article 12 (3) does not in

²⁴ Ziegler, Alexander, Schelin, Johan, Zunarelli, Stefano, *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 2010, p. 43.

²⁵ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 92.

²⁶ Karan, Hakan, *Any Need for a New International Instrument on the Carriage of Goods By Sea: The Rotterdam Rules?* Journal of Maritime Law and Commerce [0022-2410], 2011 volume 42 issue 3.

²⁷ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p. 61.

itself force a multimodal transport upon the carrier. A port-to-port contract can therefore still be agreed between the parties.²⁸

Further, according to Article 1 (1) a maritime element must be added to the equation to invoke the Rotterdam Rules but the contract do not need to be limited to a sea carriage but may in addition provide for carriage by other modes. This is what makes the Rotterdam Rules a “maritime-plus” convention and not a full multimodal convention.²⁹

Thus, a carriage solely by sea would be governed by the Rotterdam Rules, provided that the carriage is international, but during the other legs of the transport a conflict with other carriage conventions might arise. As Alexander von Ziegler puts it in “The Rotterdam Rules 2008” “The Rotterdam Rules cover not only contracts of carriage of goods by sea, but also contracts of carriage of goods by sea in combination with other modes of transport, that is, multimodal transports. This raises the question of the relationship between unimodal rules applicable to the other modes of the multimodal transport and the Rotterdam Rules. The relationship is dealt with in Articles 26 and 82.”³⁰

Thus, a potential conflict has not been left un-addressed but rather the contrary, two articles of the Rotterdam Rules have been designed to deal with possible conflict situations but the question is how successful the two articles are and whether the result is desirable. To determine this we must explore the scope of the two articles and identify possible conflicts.

²⁸ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p. 62.

²⁹ Ziegler, Alexander, Schelin, Johan, Zunarelli, Stefano, *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 2010, p. 42.

³⁰ Ziegler, Alexander, Schelin, Johan, Zunarelli, Stefano, *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 2010, p. 143.

4 SECONDARY FAILURE UNDER THE ROTTERDAM RULES

4.1 Carriage preceding or subsequent to sea carriage

Article 26 of the Rotterdam Rules governs the relationship between the Rotterdam Rules and other conventions during carriage preceding or subsequent to sea carriage when a loss, damage or delay occurs during the carrier's period of responsibility.³¹

The Article read as follows:

“When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

- (a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;*
- (b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and*
- (c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.”*

Article 26 is thus aiming at governing carriage precedent or subsequent to sea carriage.

The article only applies when the damage occurs solely before loading of the goods onto the ship or solely after the discharge of the goods from the ship. The damage must therefore be possible to localise wither to somewhere before loading onto the ship or after the discharge from the ship. If the damage occurs and can be localised to have occurred during the sea leg then Article 26 never comes into play but the normal other provisions of the Rotterdam Rules naturally applies.³²

The test for un-localised damage under Article 26 is quite different form the test applied by Article 17 when establishing whether the carrier is liable or not. Article 17 applies if the

³¹ Baughen, Simon, *Shipping Law*, (Routledge, London) 2012, 5th ed. p. 146.

³² Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p. 66.

damage occurred during the carrier's period of responsibility, while Article 26 requires that the damage to the goods occurred somewhere other than during the sea leg of the transport. Under Article 26 it is not enough that the event that caused or contributed to the damage occurred during the carrier's period of responsibility.³³

Should the parties agree to limit the contract to pure port-to-port sea carriage not involving any other modes of transport, Article 26 would needless to say not come into play even though the Rotterdam Rules would still apply. The Rotterdam Rules would then function as its predecessors the Hague, Hague-Visby and Hamburg Rules, governing the sea carriage only, to be general. If other legs of the carriage then were contracted for separately that would mean that the other transport conventions would govern their respective legs of the carriage and the Rotterdam Rules would not step in. Thus, as expressed by professor Ralph De Wit, "... a multimodal carriage of goods (provided it includes an international sea leg) *may* be entirely governed by the Rotterdam Rules, but it *must* not necessarily be so. The parties retain contractual freedom in this respect and in this sense the Rotterdam Rules are obviously not a true "multimodal Convention".³⁴

Further, to invoke Article 26 of the Rotterdam Rules, the loss, damage or delay must have occurred during the carrier's period of responsibility. The period of responsibility is set out in Article 12 of the Rotterdam Rules and this Article in general says that the responsibility for the carrier begins when the carrier or a performing party received the goods for carriage and ends when the goods are delivered.³⁵ The exact extent of the extended period of responsibility in itself will not be further examined in this thesis.

Another qualification to allow Article 26 to be invoked is the provision in the Article that the loss, damage or delay must have occurred solely before loading or after discharge from the vessel. This reflects the ambitious scope of application which the Rotterdam Rules bears: the Rules set out to govern legs of the carriage which are undertaken by other means of transport, aiming to apply the maritime rules on land or in the air as well. The Rotterdam Rules continues to govern the damage unless the damage can be localised, only then the other

³³ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p.67.

³⁴ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 94.

³⁵ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 94.

convention is allowed to step in and take precedence of Article 26 of the Rotterdam Rules subject all other criteria are fulfilled.³⁶

That is however not the end of the story. Article 26 sets out some more criteria for the international instrument than that the damage should have occurred during the carrier's period of responsibility and solely before the loading or after the discharge from the ship, the latter being the criteria of localisation.

To begin with, what is an 'international instrument' in the eyes of the Rotterdam Rules? It is clear that the phrase is broadened to include not only conventions but also other possible 'international instruments'. An example of an 'international instrument' other than a convention could be a possible EU Regulation in the subject field.³⁷

The phrase 'international instrument' is deliberately used instead of the phrase 'international conventions' that clearly broadens the concept. The term is intended to include not only EU Regulations but any regulation issued by a regional economic integration organisation might be included.³⁸

The 'international instrument under Article 26 is not required to already have entered into force when the Rotterdam Rules enters into force but includes also future 'international instruments' which, as we will see further below, differs from the use of the concept under Article 82 of the Rotterdam Rules.³⁹

It is interesting to note that it is only for 'international instruments' which Article 26 gives precedence, not for national legislation in any way even so if the national legislation would be mandatory. According to Professor Ralph De Wit, that causes a possible strange discrepancy should a sea carriage be undertaken in connection with a road carriage in Europe. If the damage was localised and the CMR would have applied to a separate road leg, then the CMR would apply but should the road carriage instead have been only domestic, then the Rotterdam Rules would precede through Article 26 which only gives precedence to 'international instruments'. The same situation would exist if the other carriage leg would be

³⁶ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 94.

³⁷ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 95.

³⁸ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p. 67.

³⁹ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p. 67.

a rail transport with the COTIF-CIM. However, Professor Ralph De Wit moves on saying that this does not appear to cause any problems as a State that has ratified the Rotterdam Rules would anyway have imported the Rotterdam Rules into its legal system and by doing so overruling its legal system.⁴⁰

To move further on with the criteria of Article 26, which the ‘international instrument’ must fulfil, these are found in paragraphs (a) to (c) of Article 26. Article 26 (a) sets out a concept of a ‘hypothetical contract’ as Professor Ralph De Wit names it.⁴¹ The paragraph further qualifies the ‘hypothetic contract’ to be separate and direct with the carrier. The ‘hypothetical contract’ must further have been made in respect of the particular stage of carriage where the loss, damage or delay occurred.⁴²

The latter qualification appears fairly straightforward. However, what is a ‘hypothetic contract’, which is separate and direct with the carrier? Does the Rotterdam Rules require the ‘hypothetical contract’ to be made on any specific terms? The criteria separate and direct appear obvious but only at a first glance.

Professor Ralph De Wit presents two approaches to this question, each which reasoning seems to be supported in different High Courts of different countries. The first approach would be to project the existing contract between the main, multimodal, carrier and the performing carrier for the specific carriage leg upon the shipper. The second approach is to look at what normally would have been agreed between the performing carrier and the shipper if they had entered into a direct contractual relationship. Unfortunately, the two approaches are immensely different and may lead to different results.⁴³

The next criteria set up by Article 26 (b) stating that the ‘international instrument’ must specifically provide for some listed, certain topics: the carrier’s liability, limitation of liability or time for suit. The Rotterdam Rules only give sign for other ‘international instruments’ concerning certain topics and if the matter in question concerns something else, the Rotterdam Rules would still precede and act as a multimodal instrument. In theory, this would lead to

⁴⁰ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd’s List Law, London) 2010. p. 95.

⁴¹ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd’s List Law, London) 2010. p. 95.

⁴² Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd’s List Law, London) 2010. p. 95-96.

⁴³ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd’s List Law, London) 2010. p. 95-96.

conflict as other conventions clearly also set out to govern other matters than the three topics listed in article 26 (b).⁴⁴

The third and final criteria set out by Article 26 is 26 (c) is that the application of the ‘international instrument’ must be mandatory. It may not be departed from by contract, at least not to the detriment of the shipper. It is the ‘international instrument’ itself (*ex proprio vigore*) which must set out that it is mandatory to the matter in question. That distinction rules out any references in national law, which makes the ‘international instrument’ mandatory. As many European states have made the unimodal conventions, Montreal Convention, CMR, CIM and CMNI, mandatorily applicable to domestic carriage in their national law systems that might impose a problem as that incorporation would make the ‘international instruments’ fall outside Article 26 of the Rotterdam Rules. Thus, as the named conventions all requires that the carriage is international then their application to domestic transport through national law would not qualify as an exception under Article 26 the Rotterdam Rules.⁴⁵

To sum up, if the loss or damage has occurred solely before loading on, or after discharge, from the carrying vessel, then, the Rotterdam Rules will not prevail over provisions of another international instrument subject that the other international instrument fulfils three criteria. To begin with, the international instrument should have been applicable if the shipper had made a separate and direct contract with the carrier for the relevant stage of the transport. Further, the international instrument must stipulate the carrier’s liability; limitation of liability or time for suit and finally, the international instrument must be mandatory in its effect.⁴⁶ According to Simon Baughen “This attempts to provide a network solution to the problems of competing conventions that occur with multimodal carriage.”⁴⁷

Thus, some qualifications remain to be discussed. If the provisions of another international instrument should be allowed to prevail over the Rotterdam Rules, the overriding provisions of the other international convention must relate to the carrier’s liability, limitation of liability and time for suit. That, in itself, is however, not enough but the provisions must be mandatory and therefore not, under the provisions of the other international instrument, be possible to depart from to the detriment of the shipper. Finally,

⁴⁴ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd’s List Law, London) 2010. p. 98.

⁴⁵ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd’s List Law, London) 2010. p. 98.

⁴⁶ Harris, Brian, *Ridley’s Law of the Carriage of Goods by Land, Sea and Air*, 2010, 8th ed. p. 401.

⁴⁷ Baughen, Simon, *Shipping Law*, 2012, 5th ed. p. 146.

the provisions of the other convention must have applied to a contract entered into between the shipper and the carrier, if entered into separately, for the particular stage of the carriage under which the event occurred.⁴⁸ Therefore, provisions of the Convention relating to the right of control will still prevail over those in the other 'instrument' and will also prevail where the claimant is unable to prove where during the carriage the loss occurred.⁴⁹ Do that mean that the Rotterdam Rules always prevails over other unimodal conventions should the damage be un-localised and the Rotterdam Rules otherwise applicable? Here we find a potential problem that will be addressed later on in this thesis.

When preparing Article 26 of the Rotterdam Rules three different approaches were considered. Should the Rotterdam Rules be created with a pure uniform system, a network system or should the Rotterdam Rules be created with a mixture of the two systems, thus a uniform and network system in fusion. The pure network system was not considered as a desirable solution as the aim with the Rotterdam Rules was to achieve uniformity.⁵⁰

With a uniform system one liability regime sets out to govern all stages of the transport regardless of when and where during that period the damage occurred. Under a network system, different stages of the transport are governed by the different international unimodal conventions or even different national law regimes depending on when and where the loss occurred.⁵¹

The network system would divided the carriage into the different modes of transport used and impose liability upon the carrier based on the regime applicable to the part of the carriage where the damage occurred as if a separate and direct contract for each mode of transport had been entered into by the parties. The uniform system, on the other hand, applies one set of liability rules to a whole transport from a to b regardless of when and where the damage occurred.⁵²

At a first glance the two systems seems hard to marry together but the systems now in place are often modified to combine a little of each, or at least to be a little less strict which

⁴⁸ Baughen, Simon, *Shipping Law*, 2012, 5th ed. p. 146.

⁴⁹ Baughen, Simon, *Shipping Law*, 2012, 5th ed. p. 146.

⁵⁰ Ziegler, Alexander, Schelin, Johan, Zunarelli, Stefano, *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 2010, p. 143.

⁵¹ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 40.

⁵² Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010.. p. 62.

makes the actual difference between the two approaches less. “For example, any network system should be supplemented by a rule that governs the carrier’s liability when it is impossible to determine where the damage occurred. The uniform system is often modified to allow the application of a part of the mandatory liability rule that governs the corresponding transport mode to the extent that the place where the damage occurs can be identified.”⁵³

To avoid conflicts with other unimodal liability regimes the Rotterdam Rules had to address the potential problem with adopting a door-to-door approach to the carrier’s period of responsibility.⁵⁴

In the end, the Rotterdam Rules ended up adopting the mixed system. To the greatest extent the Rotterdam Rules are construed with a uniform system but some of them were created to vary with the rules applicable to the different legs of transport. Thus, the general opinion seems to be that a limited network system was created.⁵⁵

All in order to avoid that a court in a state being party to both the Rotterdam Rules and other international unimodal carriage conventions which both claim applicability to the mode of transport in question under the contract of carriage having to find itself with incompatible obligations to apply the different liability schemes to the same event.⁵⁶

A uniform system gives the involved parties predictability regarding possible compensation but is less certain on the possibilities of recourse. A network system is often said to lead to unpredictable results regarding exactly which rules that governs the carrier’s liability. However, a network system would ensure that the carrier’s and the shipper’s liability corresponds with the liability of a non-maritime performing carrier. Therefore a network system assists in reducing the costs for a recourse action.⁵⁷

Also Christopher Hancook QC raise, in his chapter in the “*The Carriage of Goods by Sea under the Rotterdam Rules*” the different pros and cons of the uniform and the network

⁵³ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd’s List Law, London) 2010. p. 40.

⁵⁴ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010.. p.62.

⁵⁵ Ziegler, Alexander, Schelin, Johan, Zunarelli, Stefano, *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 2010, p. 144.

⁵⁶ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd’s List Law, London) 2010. p. 62.

⁵⁷ Ziegler, Alexander, Schelin, Johan, Zunarelli, Stefano, *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 2010, p. 144.

approaches. The biggest advantage of the uniform system, according to Hancock, is that it is a simple and transparent system. All parties will know from the beginning, which rules that applies as well as that the limitation possibilities and are clear from the outset. There is further no need to identify the exact moment that the damage occurred in a uniform system. The system is however not without another side to it. The rights of recourse that the carrier will be looking at against its sub-carriers will still be governed by the applicable unimodal regimes, whether national law or international conventions. That puts the carrier at risk as not being back to back with its sub-carriers with two different sets of regimes governing the two different relationships. In the greater perspective that also exposes the carrier to greater insurance risks as well as commercial and litigation aspects.⁵⁸

Under a pure network system on the other hand, the liabilities towards the shipper should, for the carrier, be back to back with any sub-carrier as the same regime should apply to both levels and therefore the possibilities of recourse remains available to the carrier. The shipper will however be at risk for greater exposure than under a uniform system as it is not always simple to identify during which stage of the carriage that the damage occurred and increasingly so considering the nature of more and more widely used container trade. Further, when the damage occurs gradually during the carriage or during more than one leg of the transport then a gap in the liability regime might arise.⁵⁹

According to Professor Ralph De Wit, it is submitted that, in effect, a uniform system was created and the Rotterdam Rules expands its regime to all other modes of transport, claiming to supersede national law and only allowing other international instruments to overrule it in order to avoid certain types of conflicts.⁶⁰

How is this then achieved in the Rotterdam Rules? Article 26 is designed to overtake other applicable legal regimes as much as possible without conflicting with other conventions while Article 82 is designed to operate when other regimes are claiming to be applicable to the same matter. In doing so, the Rotterdam Rules are trying to apply maritime law to land transports as much as possible.⁶¹

⁵⁸ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p.p. 40-41.

⁵⁹ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p.p. 40-41.

⁶⁰ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 92.

⁶¹ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 92-93.

It may be argued that the limited network system of liability under the Rotterdam Rules mainly is qualified into being so by its Article 26. The Article sets out to govern the situation, during a carriage to which the Rotterdam Rules claim applicability, to damage that is localised to another mode of transport. Article 26 sets out how certain types of provisions of another mandatory, unimodal, convention would be allowed precedence over the Rotterdam Rules. If the damage is un-localised the Rotterdam Rules will apply.⁶² Article 26 of the Rotterdam Rules will be discussed in more detail further on in this thesis.

Article 26 is not mandatory and the contracting parties can derogate from the provision if wanted as long as this is not contrary to Article 79 of the Rotterdam Rules, which stipulates that the parties cannot exclude or limit the carrier's liability, neither directly nor indirectly. However, the parties can agree to a higher limitation of liability under the Rotterdam Rules but if the higher limit also exceeds the limits that would be applicable under Article 26, such as in the CMR, such a higher limitation might not be allowed under the CMR.⁶³

“Only provisions in mandatory international unimodal conventions – or rather instruments – regulating non-maritime legs and dealing with the carrier's liability, limitation of liability and time for suit...are made directly applicable between the carrier and the shipper and prevail as a kind of *lex specialis* over the Rotterdam Rules.”⁶⁴ Thus, most issues seem to be governed by the Rotterdam Rules and only a few by other international instruments.

The limited network system eliminates the potential conflicts with other conventions or ‘international instruments’ to a large extent but it still leaves the possibility for contracting states ending up with conflicting obligations under the Rotterdam Rules and another international unimodal carriage convention. The authors of the Rotterdam Rules recognised that there was a gap left despite Article 26 and that the Rotterdam Rules needed to safe guard against such situations. The safe guard was needed to protect states that both wanted to be a party to the Rotterdam Rules as well as to other international carriage conventions.⁶⁵

⁶² Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 43.

⁶³ Ziegler, Alexander, Schelin, Johan, Zunarelli, Stefano, *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 2010, p. 145.

⁶⁴ Ziegler, Alexander, Schelin, Johan, Zunarelli, Stefano, *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 2010, p. 144.

⁶⁵ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p. 71.

It is disputed whether the Rotterdam Rules potentially could be in conflict with unimodal international instruments at all when it comes to non-maritime transport of goods. Article 26 of the Rotterdam Rules were initially designed to deal with the issue but in the final part of the negotiations of the Rotterdam Rules, a separate provision was created to govern potential conflicts with other conventions.⁶⁶ This provision is Article 82 which is designed to operate when another conventions is claiming to govern the same matters as the Rotterdam Rules claim.⁶⁷

4.2 Other international conventions

The relationship between the Rotterdam Rules and other international conventions is regulated in Article 82 of the Rotterdam Rules. Article 82 of the Rotterdam Rules reserves the right of a contracting state to apply already existing international conventions in force at the time the Rotterdam Rules enters into force.⁶⁸

The Rotterdam Rules were in principle designed to cover carriage by sea and only In certain exceptional circumstances apply to multimodal carriage subject that one of the legs of the transport is a sea leg.⁶⁹

Article 82 provides that the Rotterdam Rules shall not affect the application of any of the below following international conventions in force at the time the Rotterdam Rules enters into force. All future amendments to these international conventions, which regulates the liability of the carrier for loss of, or damage to, the goods are included by Article 82 to override the Rotterdam Rules.⁷⁰

The existing international unimodal carriage conventions does not explicitly address whether they do apply to a particular stage of transport as part of a longer multimodal

⁶⁶ Ziegler, Alexander, Schelin, Johan, Zunarelli, Stefano, *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 2010, p. 144.

⁶⁷ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 93.

⁶⁸ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p. 72.

⁶⁹ Karan, Hakan, *Any Need for a New International Instrument on the Carriage of Goods By Sea: The Rotterdam Rules?* *Journal of Maritime Law and Commerce* [0022-2410], 2011 volume 42 issue 3.p. 443.

⁷⁰ Harris, Brian, *Ridley's Law of the Carriage of Goods by Land, Sea and Air*, 2010, 8th ed. p. 397-398.

transport. It is therefore not clear whether a conflict between the Rotterdam Rules and one of the other unimodal carriage conventions actually is a real possibility or merely a theoretical one. The interpretation and actual application of the different unimodal carriage conventions does also vary between different states and this complicates the issue further.⁷¹

The interpretation may not be a question of right or wrong as every state keeps their authority to interpret the international conventions and instruments that they ratify and therefore conflicts are easily anticipated.⁷²

Articles 26 and 82 “...appear to have been designed so as to ensure that the Rules would take effect as a pure network solution giving way to the existing unimodal regimes as and when, according to their own provisions they would apply to multimodal carriage. However a literal interpretation of their provisions suggests that they might not have that effect.”⁷³ The Rotterdam Rules do not require that other unimodal conventions than for conventions for carriage by sea, previously entered into, is denounced when the Rotterdam Rules is ratified and entering into force.⁷⁴ Thus, a possible conflict might arise if a literal interpretation is applied to the relationship between the Rotterdam Rules and other international conventions.

However, it is important to note that Article 82 only refers to amendments to the international conventions in force at the time the Rotterdam Rules enters into force. That means that future conventions are not included in the article and will not be given precedence by the Rotterdam Rules. By contrast, Article 26 does not limit itself to only already existing conventions.⁷⁵

Four different types of unimodal carriage conventions are identified by Article 82 of the Rotterdam Rules. The article read as follows:

“Nothing in this Convention affects the applicability of any of the following international conventions in force at the time this Convention enters into force that regulate the liability of the carrier for loss of or damage to the goods:

⁷¹ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p. 64.

⁷² Fujita, Tomotaka, *The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implications*, Texas international law journal, 2009, volume 44, issue 3, p. 357.

⁷³ Harris, Brian, *Ridley’s Law of the Carriage of Goods by Land, Sea and Air*, 2010, 8th ed. p. 401.

⁷⁴ Harris, Brian, *Ridley’s Law of the Carriage of Goods by Land, Sea and Air*, 2010, 8th ed. p. 401.

⁷⁵ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd’s List Law, London) 2010. pp. 99-100.

- (a) Any convention governing the carriage by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;*
- (b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a cargo vehicle carried on board a ship;*
- (c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or*
- (d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.”*

Thus, Article 82 attempts to deal with the relationship between the Rotterdam Rules and other international carriage conventions. The question is, is this attempt successful or could any clashes occur? That will be investigated in the following text when looking closer at the subparagraphs (a) to (d) under each heading.

4.2.1 Carriage of goods by air

To start with, Article 82 (a) deals with the Rotterdam Rules in relation to air carriage. Even though it is unusual that a contract provides for both air and sea carriage and if so, a conflict could only arise in certain specific situations it could still be a potential problem.⁷⁶

The relevant conventions governing carriage by air in force now are the Montreal and Warsaw Conventions. The two conventions have slightly different approaches to their applicability as the Montreal Convention applies to actual carriage by air without setting up any criteria that a specific contract for carriage of goods by air must have been concluded. The Warsaw Convention on the other hand adopts the same contractual approach as the other unimodal conventions do.⁷⁷

An actual conflict could occur if the parties were to contract for a multimodal carriage that includes both carriage by air and by sea, subject that both are international, and the goods is damaged by a cause occurring during the air leg and that actual damage is not suffered until

⁷⁶ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p.72.

⁷⁷ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 100.

during the sea leg. As only the cause of the damage, and not the damage itself, occurs during the air leg Article 26 does not apply to the situation but as the damage occurs during the sea leg instead the Rotterdam Rules would apply in themselves if the Article 82 (a) of the Rotterdam Rules had not been there. The Montreal Convention would also claim applicability to the situation as it explicitly provides for its own application in cases of a multimodal transport including an air leg. The Montreal Convention Article 1(2) further restricts its applicability only to the part of the multimodal transport carried by air but the Montreal Convention also goes further providing that the carrier is liable for "...damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage of air."⁷⁸

Therefore the Montreal Convention claims to apply even though the damage actually was suffered by the goods during the sea carriage in the event that the cause of the damage occurred during the air carriage. The network principle adopted by Article 26 does not solve this issue and a state contracting both the Rotterdam Rules and the Montreal Convention would have faced a difficult situation in determining which convention to give precedence to in the absence of Article 82 (a) of the Rotterdam Rules.⁷⁹

The Montreal Convention is only applicable to carriage by air in accordance with its Article 38. That means that the loss must be localised for the Montreal Convention to apply at all, if the damage occurs during a multimodal transport and is un-localised the Rotterdam Rules would apply as long as the sea carriage was international. At a first glance, there does not appear to be any conflict here. However, had the sea carriage been part of "...in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment" the damage is presumed to have occurred during the carriage by air anyway under Article 18 (4) of the Montreal Convention. This conflict is resolved under Article 82 of the Rotterdam Rules who again gives precedence to the Montreal Convention.⁸⁰

⁷⁸ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p. 72.

⁷⁹ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p.p. 72-73.

⁸⁰ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 100.

Further, if the goods should have been carried by air but are carried by another mode of transport that would constitute a breach of contract and article 18 (4) of the Montreal Convention would continue to govern the transport.⁸¹

Article 82 (a) is arguably the most comprehensive safeguard among the safeguards under Article 82 of the Rotterdam Rules. This is the case as the scopes of application under the Warsaw Convention and the Montreal Convention are broader and therefore in possible conflict with Article 26 of the Rotterdam Rules.⁸²

However, there still remains at least one possible conflict when the damage is un-localised as Article 26 sets out to govern that exact situation overriding the second sentence of Article 18(4) of the Montreal Convention also claiming applicability while presuming that un-localised damage presumably occurred during the air leg.⁸³

To sum up, if the damage is localised to the air leg, then the Montreal Convention would apply to the event.

Article 82 (a) of the Rotterdam Rules sets out to govern the evolving un-localised damage during a multimodal transport involving both an air leg and a sea leg while Article 26 of the Rotterdam Rules over-rides the presumption in Article 18 (4) of the Montreal Convention. Little conflict is therefore still

4.4.2 Carriage of goods by road

Article 82 (b) governs the relationship between the Rotterdam Rules and carriage by road under other conventions. In practice, at least in Europe, that would mean the relationship between the Rotterdam Rules and the CMR. If a separate contract is made for carriage by road including a sea leg and the goods are still loaded on a truck, a so-called roll-on roll-off operation, Article 2 of the CMR applies to the contract. This could be described as a “road plus” system in contrast to the Rotterdam Rules’ “maritime plus” approach. However, the sub contract between the road carrier and the sea carrier regarding the sea leg might make the

⁸¹ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd’s List Law, London) 2010. p. 100.

⁸² Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p. 73.

⁸³ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p. 73.

Rotterdam Rules applicable through the CMR Article 2 and the Rotterdam Rules Article 12 expanding the carrier's period of responsibility to the door-to-door approach and therefore including the road leg into the sub contract for the sea leg.⁸⁴

Just because the CMR limits its applicability to the roll-on roll-off service with loaded road cargo vehicles carried on ships to or from CMR countries the scope of the convention is not as broad as that of the air conventions. However, the Rotterdam Rules Article 82 (b) claims applicability to international sea carriage and therefore includes the roll-on and roll-off trade when damage occurs during the sea carriage. The Article 2 (1) of the CMR claims applicability for CMR to the whole contract of carriage, including the sea leg, at the same time. The relevant part of Article 2 (1) of the CMR reads as follows "where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and... the goods are not unloaded from the vehicle, this convention shall nevertheless apply to the whole of the carriage."⁸⁵

Again, the network system operated by Article 26 of the Rotterdam Rules does not assist as a state party to both the conventions would face difficulties in deciding which convention to give precedence over the other. Article 82 (b) yields in this case to the provisions of the CMR.⁸⁶

If the contract entered into instead were a contract for international carriage by sea with a carriage before and after the roll-on roll-off sea leg by road the exact same transport would be performed but the governing regime would be different. The contract would be governed by the CMR but Article 26 of the Rotterdam Rules would also claim precedence for the Rotterdam Rules. This conflict was however, intended to be solved by Article 82 of the Rotterdam Rules giving precedence to the CMR.⁸⁷

However, that might not be the case. At first sight the above situation with the Rotterdam Rules yielding to the CMR comes at hand but a literal reading of Article 82 (b) might give a somewhat strange result. The situation described above could make the Rotterdam Rules

⁸⁴ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 101.

⁸⁵ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p.p. 73-74.

⁸⁶ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010. p. 74.

⁸⁷ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 101.

excluding the CMR or from applying to the situation at all through the Rotterdam Rules Article 82 if the Rotterdam Rules was mandatory. The conflict would not be solved there, as the CMR still would claim to govern the situation considering that the contract would still be for an international carriage of goods by road under CMR Articles 1 and 2. Should the damage in addition be un-localised then the Rotterdam Rules Article 26 claim to be applicable to the road legs surrounding the sea carriage.⁸⁸

According to Professor Ralph De Wit the reasonable construction of Article 82 (b) would be to read it in the same way as the other subparagraphs of the Article; that the Rotterdam Rules should, in a conflict, give precedence to the unimodal convention when there is a multimodal element in the operation of the other convention. That would also address the by Professor Ralph De Wit perceived illogical operation of the CMR when the goods are shipped in a roll-on roll-off operation and the CMR would claim applicability throughout the transport and the Rotterdam Rules might apply to the sea carriage when mandatory.⁸⁹

The solution would, in the same example as set out above with an international sea carriage with two surrounding road legs, be that when the damage is un-localised the Rotterdam Rules Article 26 would claim applicability to the road legs as would the CMR under its Articles 1 and 2. Article 82 of the Rotterdam Rules would then yield for the CMR granting it to govern the road legs. On the sea leg, however, the CMR would claim applicability via its Article 2 but it would give way to the Rotterdam Rules if they were mandatory applicable.⁹⁰

The contract must however be qualified as to be a contract for international carriage of goods by road in which Article 41 of the CMR claim that CMR is mandatorily applicable. As long as the above set out situation with the argued sensible construction of Article 82 of the Rotterdam Rules there appears to be little room for conflicts even here.⁹¹

⁸⁸ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p.p. 101-102.

⁸⁹ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 102.

⁹⁰ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 102.

⁹¹ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 103.

4.4.3 Carriage of goods by rail

Article 82(c) regulates the relationship between the Rotterdam Rules and other conventions in relation to carriage of goods by rail. The relevant unimodal convention for carriage by rail is the COTIF-CIM.

The possibilities for clashes between the COTIF-CIM and the Rotterdam Rules are limited as Article 1(4) of COTIF-CIM sets out that the COTIF-CIM will apply during the whole transport if the sea leg is performed on services of the registered lines contained in the “CIM list of maritime and inland waterway services” referred to in Article 24 of the COTIF. In reality, few such lines are at hand. However, in case such a line is at hand, in general the COTIF-CIM precedes the Rotterdam Rules in accordance with Article 82 of the Rotterdam Rules.⁹²

The COTIF-CIM may apply to a whole carriage with a rail leg including a sea leg subject that, firstly, the sea carriage is to be regarded as a supplement to the rail carriage and, secondly, that the sea leg is performed on a service line contained in the list referred to above. Article 1 (4) of the CIM-COTIF reads as follows: “...when international carriage being the subject of a single contract of carriage includes carriage by sea or trans-frontier carriage by inland waterway as a supplement to carriage by rail, these Uniform Rules shall apply if the carriage by sea or inland waterway is performed on services included in the list of services provided for in article 24 s.1 of the Convention”. Also this possible conflict is addressed by one of the safeguards of Article 82 of the Rotterdam Rules, namely by Article 82 (c).⁹³

4.4.4 Carriage of goods by inland waterways

Article 82 (d) is the last safe guard contained in Article 82 of the Rotterdam Rules and the safeguard is directed towards carriage of goods by inland waterways without transshipment. The Rotterdam Rules Article 82 (d) makes the carrier subject to the Rotterdam Rules when damage occurs during a transport partially by sea and partially by inland waterway. This conflict would again not be solved by Article 26 of the Rotterdam Rules, as the carriage by inland waterway without transshipment onto another vessel does not occur solely before

⁹² Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd’s List Law, London) 2010. p. 104.

⁹³ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010.p. 74.

loading onto or after discharge from the ship and therefore not make the article come into play at all even though the Rotterdam Rules in themselves would claim applicability, subject to that the carriage is international, to the scenario.⁹⁴

Thus, the relationship between Article 82 of the Rotterdam Rules and the CMNI governing carriage of goods by inland waterways is not as uncomplicated as the relationship with the COTIF-CIM. Article 2 (2) of the CMNI provides that the CMNI shall apply if the contract is made for the carriage of goods without transshipment both on inland waterways and in waters to which maritime regulations apply. Should a maritime Bill of Lading have been issued or the distance for the sea leg have been greater than the distance of the carriage by rail the CMNI will not take precedence.⁹⁵

The CMNI may also claim applicability to the entire contract of carriage including both the carriage by inland waterway and another sea leg under the above set out special circumstances. Therefore, a state party to both the Rotterdam Rules and the CMNI may find itself in difficulties to decide which convention to give precedence over the other when dealing with a carriage both on in line waterways and internationally without transshipment and no Bill of lading is issued at the same time as the distance of the inland waterway leg is longer than the distance of the other international sea leg. Again the safeguard in Article 82 (d) gives precedence to the other convention, in this case, to the CMNI.⁹⁶

4.4.5 Multimodal aspects of the unimodal conventions

All the unimodal conventions do however operate at, as Professor Ralph De Wit names it, ‘a limited multimodal level’ as we will see below. This is also true about the Rotterdam Rules.⁹⁷

The CMR, COTIF-CIM and the CMNI only governs contracts entered into for the specific

⁹⁴ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010.p. 75.

⁹⁵ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd’s List Law, London) 2010. p. 104.

⁹⁶ Sturley, F., Michael, Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules – The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters (Legal) Limited, London) 2010.p.75.

⁹⁷ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd’s List Law, London) 2010. p. 104.

Transport mode set out in each of them while the Warsaw and Montreal Conventions claim to apply to actual carriage by air. The problem is whether the unimodal conventions applying a contractual approach can govern any part of a multimodal transport as such a contract actually would not be for a unimodal transport but for a multimodal one. If the parties have agreed to a specific mode of transport then the question is what happens if the carrier departs from the agreed mode of transport and use another mode to actually perform the carriage. Would it then be the parties' intention for a specific mode of transport to be used that should be used when determining whether the contract is a contract for a multimodal or for a unimodal transport? Or would it be the transport mode actually used to perform the carriage or even both that should be used when determining the applicable regime?⁹⁸

If the carrier, during an international road plus sea carriage the latter intended to be a roll-on roll-off leg, is forced to for example unload the goods from the road vehicle and ship it as a container instead then the CMR, which otherwise would have governed the full transport, arguably might be forced to give way for another convention. If the goods in some way are damaged during this carriage, performed in breach of contract, problems will arise while trying to apply a network system to the events.⁹⁹

Further, the CMR through its Article 1 claims to be applicable to all contracts for the international carriage of goods by road. That might seem clear but what qualifies a contract as being for the international carriage of goods by road? Should the contract have been specifically naming that the goods will be carried by road or would it for instance be enough that the contract is made with a road carrier? Further, might that actually mean that the CMR would not be applicable to the situation by itself but that it may have to give way to the Rotterdam Rules Article 26 instead?¹⁰⁰

4.4.6 Carriage of goods as a multimodal transport

The Multimodal Transport Convention has not entered into force yet and it is not sure that it will. However, it is interesting to consider the modified network solution embodied by the Multimodal Transport Convention. The Multimodal Transport Convention provides for "...a

⁹⁸ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 105.

⁹⁹ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 106.

¹⁰⁰ Rhidian, D., Thomas, *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List Law, London) 2010. p. 106.

networked scheme of financial limitations based on whichever of the unimodal regimes or mandatory national legislation might be applicable in the particular circumstances of any claim.¹⁰¹

Article 82 of the Rotterdam Rules does however neither give precedence to the Multimodal Transport Convention nor even consider it.

4.5 Summary

The Rotterdam Rules operates a maritime plus approach in which an international sea leg is required but the Rotterdam Rules does not limit their application to the sea leg itself, it has adopted a door-to-door approach extending the sea carrier's period of responsibility from the tackle-to-tackle principle which traditionally have been widely accepted in sea carriage. As the Rotterdam Rules are widening their applicability to other means of carriage the relationship with other unimodal conventions has been considered in the formation and two articles were inserted in this respect.

In order to avoid conflicts with other international instruments the Rotterdam Rules has adopted a so-called 'limited network system' with features from both a uniform system as well as from a network system.

Article 26 of the Rotterdam Rules governs the application of the Rotterdam Rules to damage, loss or delay that occur solely prior or after the sea carriage, that is damage occurring during another mode of transport. Article 82, however, regulates the relationship between the Rotterdam Rules and other international instruments and operates as a safeguard for states that are contracting parties to both the Rotterdam Rules and the other unimodal conventions. Together the two articles attempts to govern and avoid possible clashes with other international instruments.

Article 82 limits the conventions it gives precedence to, to the conventions in existence at the time when the Rotterdam Rules enters into force and it is thus noteworthy that it does not give way to conventions entering into force thereafter. However, no such limit is set out in Article 26.

The international instruments that might come into conflict with the Rotterdam Rules are mainly the road convention CMR, the rail convention COTIF-CIM, the conventions for

¹⁰¹ Harris, Brian, *Ridley's Law of the Carriage of Goods by Land, Sea and Air*, 2010, 8th ed. p. 397-398.

carriage by air; the Warsaw Convention and the Montreal Convention. The Multimodal Convention having not entered into force yet is less likely to come into conflict with the Rotterdam Rules and is also not considered by the safe guard of Article 82 of the Rotterdam Rules. Any such conflict would have to be dealt with under Article 26 even though unlikely. However, the concept of an 'international instrument' is wider than only international conventions and may include for example EU Regulations.

The question is whether Articles 26 and 82 of the Rotterdam Rules are successful in seamlessly regulating the relationship with other international instruments or if any unregulated problems still might arise in connections with an un-localised damage. So far some potential conflicts have been identified, especially in relation to the CMR convention.

5 CONCLUSION

No doubt the Rotterdam Rules will be a new liability regime for the sea carriage, if entering into force, however expanding the liability scheme of the sea carrier when the goods is on board the vessel during the sea carriage but also to other modes of transport, by road, by air and by rail or inland waterway. That all depends on how the contract is formed and when and where the damage occurs, whether it may be localised or not. If the damage may be localised then the Rotterdam Rules and the unimodal conventions might all claim applicability to the events, dependent on where and when, but in many cases the situation actually seem to be solved by Article 82 or Article 26 of the Rotterdam Rules. If signing and ratifying the Rotterdam Rules, one should be aware that the Rotterdam Rules, as set out above, often try to take precedence where it can. The Rotterdam Rules also set out when and how it allows the existing unimodal conventions to operate in a certain situation. The criteria set out by the Rotterdam Rules are strict in many ways. If the damage is clearly located few problems seems to occur as either one of the unimodal carriage conventions is allowed to step in or the Rotterdam Rules takes precedence.

However, if the damage is not localised but rather un-localised, evolving damage, so-called secondary failure, the picture becomes much more blurred. As set out above, at a first glance the regime seems fairly straightforward but upon a closer look, possible problems arise. Often both the unimodal carriage conventions claim applicability, such as the one of the conventions for the carriage by air, the Montreal Convention, and the Rotterdam Rules claiming precedence to an un-localised damage occurring somewhere during an multimodal transport.

For example, as set out above, if the cargo is damaged by a cause which occurs during the carriage by air but the actual damage is not suffered until during the sea leg, then Article 26 of the Rotterdam Rules would not apply as the damage occurred during the sea leg. Further, the Rotterdam Rules would claim applicability by their own force but Article 82 (a) of the Rotterdam Rules would give precedence to the Montreal Convention claiming applicability as the cause of the damage occurred during the sea carriage. This scheme of applicability requires that the damage actually is localised to operate in this satisfactory way. If the damage had been a secondary failure, either evolving or merely un-localised then the Rotterdam Rules would operate in a multimodal way giving itself precedence.

When dealing with road carriage and the CMR convention the most likely place for conflict between the CMR and the Rotterdam Rules appears to be during the roll-on roll-off

service or when a road carrier sub contracts a sea carrier to perform part of the voyage. As the Rotterdam Rules sets out to claim applicability to sea carriage and the CMR to apply for the full contract of carriage including the sea leg to vehicles carried on board ships subject that the goods remain loaded on the vehicle. Some other qualifications apply as set out above but the idea here is not to repeat them but merely to show a possible inconsistency. In this situation, Article 26 of the Rotterdam Rules does not come into force if the damage is un-localised nor do Article 82 (b) and again the damage would be governed by the Rotterdam Rules in their own force.

The relationship between the Rotterdam Rules and the CMNI governing transport of goods by inland waterway without transshipment the CMNI claims to apply to the carriage unless a maritime Bill of Lading has been issued or if the other sea leg is longer. The CMNI may this way claim applicability to the full contract of carriage. A state trying to apply both the Rotterdam Rules and the CMNI may find that Article 82 (d) is designed to deal with this situation.

When moving on to carriage by rail and the COTIF-CIM's relationship with the Rotterdam Rules the possible clashes are rather limited. The COTIF-CIM provides that it will apply to the full carriage if including certain named services of lines at sea and in general it is thought that the Rotterdam Rules would yield to the COTIF-CIM under the Rotterdam Rules Article 82 (c). It appears as if even though any damage would be un-localised no actual conflict seems to be at hand and the conventions operating satisfactorily together.

This raises the question whether it is the vagueness of the formulations in the Rotterdam Rules that are the problem when trying to define the applicable regime in cases of any type of secondary failure. A perhaps far-fetched thought is to amend the existing unimodal conventions to use a language and adopting boundaries that work together with the new liability regime presented by the Rotterdam Rules? Or to go even further, perhaps the answer, even though massive in its possible scope, to actually consider to make one and only multimodal convention applying to all modes of transport? Or to go a little smaller and perhaps more realistic and giving the possibility to recognise the different challenges faced during each mode of transport, to work out a concept of several unimodal regimes which operates together to create a seamless chain of forwarding liability. Or if even stepping back a little further from this thought, try to amend the existing unimodal liability regimes to co-operate in a more clear way?

If not going after such grand gestures, the question will instead perhaps remain then whether the above presented constantly multimodal operation of the Rotterdam Rules is

desirable and that is something that the states potentially adopting the system will have to decide on.

The language used in the Rotterdam Rules leaves the door open for many interpretations of exactly when and where the Rotterdam Rules should take precedence and when another international carriage convention is allowed to step in.

The question is also how the different courts in their own national legal contexts will approach such a conflict between conventions, which actually are legal instruments of the same level. How will the conflict between two legal instruments be handled, which one of them would be treated as the *lex specialis* over the other? It seems to be the Rotterdam Rules and as long as one is aware that is not a problem. However, that means that everyone needs to be aware and agree to allow a uniform system to apply to and deal with the concept of secondary failure, the un-localised and / or evolving damage type.

As the convention in itself was formed to be somewhat unclear and opening up to a wider range of interpretation inevitably a greater amount of difficulties to interpret it follows. With one of the leading ideas of forming the new convention being to allow a more uniform system for multimodal transport involving a sea leg it might seem as a failure that it already before entering into force seem to stir up debate on the interpretations possible. On the other hand, in specifying something too much the object of regulation may very well be lost on the way. It is therefore very hard to say that the Rotterdam Rules should have been made clearer as to exactly how they were intended to interact with the other unimodal carriage conventions already in existence. It further complicates matters that the Rotterdam Rules opens up for future 'international instruments' to be given precedence under its Article 26 but to look at that from the other side would also mean that the convention more or less would close its doors to future developments in the legal context of international transport. The Convention would inevitably become dated the same day it first saw daylight.

The idea presented above that as none of the existing unimodal carriage conventions explicitly address whether they may be applied to a unimodal transport leg involved in a longer multimodal carriage there might not be more than a theoretical conflict and actually not a practical one seems to be a little naive and also incorrect when looking at for example the air carriage conventions. It is not hard to see a court in a state that is a contracting party to both the Rotterdam Rules and another unimodal carriage convention finding itself in difficulties when deciding which convention to apply. Especially as the Rotterdam Rules actually not is a multimodal convention but a mere maritime plus convention and is so by choice of the authors, not as an accident. If one court might find itself in difficulties then more

courts might do so as well and the uniform goal of the Rotterdam Rules would soon be lost. And yet again, the states becoming parties to different conventions are autonomous, they do keep their freedom to apply and adapt the conventions to their own national system as they like. Considering the big differences between for example Scandinavian law and English law that might also be necessary in order to promote such attempts to regulate international transport as the Rotterdam Rules. Is it realistic to expect a uniform approach throughout the states of the world at this point in time?

The possible scope of the phrase ‘international instrument’ in Article 26 of the Rotterdam Rules should mean that other regional but international organisations other than the EU also should be able to issue ‘international instruments’ that should be allowed to precede the Rotterdam Rules subject to fulfilling the other criteria of the Article. Who and what would in the end determine which organisations that would be allowed to issue such international instruments? Which criteria would be set to qualify such an ‘international instrument’ in the eyes of the Rotterdam Rules? We have seen that a EU Regulation may well qualify and then it is not far to think that the African Union for example also may establish similar ‘international instruments’. These questions falls outside the scope of this thesis but the idea is interesting. Would, for example, an existing international organisation or even, to take it further, some States disliking the effects of the Rotterdam Rules, if entered into force, be able to issue such an ‘international instrument’ which fulfils the criteria in Article 26 and thus preceding the Rotterdam Rules in effect circumventing the uniform idea of the Rotterdam Rules? If possible, that might be one way to set the intended new Convention out of force if anyone would like to.

The issue with Article 26 of the Rotterdam Rules giving itself the possibility to supersede national law needs to be addressed a little further. If considering Professor Ralph De Wit’s statement on the issue further, one can but find that Professor Ralph De Wit’s statement that it is not a problem that the Rotterdam Rules takes precedence over national law would not be without problem if an international sea carriage with a domestic road or rail leg in the end, or beginning, of the carriage were performed and only one of State A or State B had ratified the Rotterdam Rules. If only one State of the two had ratified the Rotterdam Rules, then the Rotterdam Rules would claim to take its uniform approach into a State, which has not ratified the Convention, and claim precedence over its national law. It is easy to see the objections that might arise. Also, if a court of the latter national law regime, which have not ratified the Rotterdam Rules is put to decide the situation it is not a far-fetched thought that the Rotterdam Rules would not be applied but rather the national system in force where the

damage occurred. Then a situation in which the Rotterdam Rules claims applicability but will not be allowed to apply will arise and the predictability sought by making the door-to-door approach will be lost.

Article 82 clearly appears to be functioning quite well in relation to some of the unimodal conventions. Few real problems appear to arise in connection to the convention governing rail road carriage: the COTIF-CIM, where, as long as the damage is localised they apply but when the damage is un-localised the Rotterdam Rules applies.

Do sea carriers then need to fear the extended period of responsibility in the event of an un-localised, systemic damage during a multimodal carriage?

Article 12 of the Rotterdam Rules means that the carrier's period of responsibility under the Rotterdam Rules is extended to a so-called door-to-door approach in comparison to its predecessors' period of responsibility, of port-to-port or tackle-to-tackle, of the carrier. Or in fact, it appears as if the period of responsibility is extended unless you enter into a separate port-to-port contract for the sea leg and at least one other contract for the other legs of the carriage. The Rotterdam Rules would then govern the sea carriage, if we presume that it is applicable, but it would not govern the rest. Therefore, if fearing the extended door-to-door regime the sea carrier seems to be able to avoid it.

Will avoidance of its expanded liability regime be the future of the Rotterdam Rules if the Convention enters into force? An ambiguous almost uniform network system expanding the period of responsibility, which no doubt will be used by some and not by others if they can avoid it. That approach of avoidance and incorporation is, however nothing new under the sun and inventive people trying to get around regulations have always been able to find their way.

Many states and maritime carriers now seem to consider whether it is desirable for the Rotterdam Rules to enter into force, should they sign and ratify or should they keep the old well-known regimes or are they merely waiting for everyone else to go first? A great deal of scepticism to the door-to-door approach seems to be at hand but also a good deal of misinformation on the actual scope of the Rotterdam Rules and how the liability scheme actually operates. So far, the enthusiasm seem to have been somewhat limited considering the modest number of states signing the Convention and the even smaller number ratifying it. It is very hard to predict whether it will be a failure or a success, time will have to tell. However, the further destiny of the Rotterdam Rules will no doubt be very interesting to follow and something which at least I shall keep an eye on.

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